IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

United States Courts
Southern District of Texas
FILED

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Michael N. Milby, Clerk

MARK NEWBY, *et al.*, Individually and On Behalf Of All Others Similarly Situated,	§	
Plaintiffs,	§	**CIVIL ACTION NO. H-01-3624 (Consolidated)**
v.	§	
ENRON CORP., *et al.*,	§	
Defendants.	§	

DEFENDANT LAWRENCE GREG WHALLEY'S MOTION TO DISMISS

Plaintiffs have failed to plead a securities fraud action against Lawrence Greg Whalley.[1] The deficiencies in the few allegations against Mr. Whalley are obvious under the standards established by this Court and others under Rule 9(b) of the Federal Rules of Civil Procedure and the Private Securities Litigation Reform Act (the "PSLRA").

Introductory Statement

Plaintiffs do not attribute a single misleading statement to Mr. Whalley; they do not accuse him of any self-dealing; nor do they implicate him in the financial reporting and accounting of Enron. Except for boilerplate (such as the listing of defendants), Mr. Whalley is mentioned only seven times in the entire Complaint. Those seven references fall into four categories: (a) Mr. Whalley's positions within Enron; (b) two references to statements made (but not attributed specifically to Mr. Whalley) during presentations to analysts; (c) an interview by Vinson & Elkins;

[1]Mr. Whalley joins in and incorporates by reference the arguments in Defendants' Joint Brief Relating to Enron's Disclosures and the Joint Brief of Officer Defendants.

and (d) unspecified sales of Enron stock. As discussed below, these few references to Mr. Whalley do not state a claim against him for securities fraud.

Allegations of scienter are altogether lacking. Plaintiffs do not allege (1) what Mr. Whalley specifically knew at any point in time, (2) what material undisclosed information Mr. Whalley may have known, (3) when or how Mr. Whalley became aware of any such undisclosed material information, or (4) any facts giving rise to an inference that Mr. Whalley acted with the required state of mind. Plaintiffs' allegations of insider trading are also inadequate. Plaintiffs have failed to identify what material inside information Mr. Whalley was aware of when he traded or to allege anything at all – suspicious, unusual, or otherwise – about Mr. Whalley's unspecified sales of Enron stock. Finally, they have not alleged any particularized facts as to how Mr. Whalley participated in any scheme to defraud.

In short, Plaintiffs have not met the particularity requirement, the basis requirement, or the strong inference requirement under the PSLRA or Rule 9(b) for pleading an action as to Mr. Whalley.

I. THE APPLICABLE PLEADING REQUIREMENTS

The standards applicable to pleading this securities fraud case against Mr. Whalley are set forth in the Joint Brief of Officer Defendants, which is incorporated herein by reference. Among the pertinent requirements, as stated by this Court, is "Plaintiffs must allege what actions each Defendant took in furtherance of the alleged scheme and specifically plead what he learned, when he learned it, and how Plaintiffs know what he learned." *In re Securities Litigation BMC Software, Inc.*, 183 F. Supp. 2d 860, 886 (S.D. Tex. 2001). As regards alleged misstatements, Plaintiffs must "specify the statements contended to be fraudulent, identify the speaker, state when and where the statements

were made, and explain why the statements were fraudulent." *Id.* at 865 n.14 (quoting *Williams v. WMX Techs., Inc.*, 112 F.3d 175, 177 (5th Cir.), *cert. denied*, 522 U.S. 966 (1997)). It is therefore necessary to examine the "specific" allegations that have been made against Mr. Whalley.

II. THE ALLEGATIONS SPECIFICALLY REFERENCING WHALLEY DO NOT MEET RULE 9(b) OR PSLRA PLEADING REQUIREMENTS.

"Specific" allegations in the Complaint concerning Mr. Whalley fall into four categories: (a) his position with Enron; (b) two references to statements made (but not attributed specifically to Mr. Whalley) during conference calls with analysts; (c) an interview by Vinson & Elkins; and (d) unidentified sales of Enron stock by Mr. Whalley. None of these allegations – either individually or in the aggregate – satisfy pleading requirements under Rule 9(b) and the PSLRA.

A. Mr. Whalley's Position with Enron

In paragraphs 83(u) and 88, Plaintiffs identify Mr. Whalley as President & Chief Operating Officer, Enron North America or Enron Wholesale Services (1999 and 2000) and, since August 2001, President and Chief Operating Officer of Enron. Plaintiffs also allege that Mr. Whalley was a member of Enron's Executive or Management Committee in 1999 and 2000.[2] These allegations, however, are not sufficient to state a claim against Mr. Whalley for securities fraud. *See* Section II.A, Joint Brief of Officer Defendants.

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[2] While the Complaint alleges that "virtually all of Enron's top insiders have been kicked out of the Company," (Complaint ¶ 4), that statement does not apply to Mr. Whalley. He remained employed by Enron until January 2002, when UBS Warburg acquired Enron's wholesale trading business and Mr. Whalley went with that business to UBS Warburg.

B. Statements Made During Conference Calls with Analysts

In paragraph 366, Plaintiffs assert that Mr. Whalley was one of seven Enron officers who, on October 16, 2001, participated in a conference call for analysts and investors, and in "follow-up conversations," concerning Enron's 3rd Quarter 2001 results; and in paragraph 388, Plaintiffs assert that Mr. Whalley was one of four officers who held a conference call for analysts on November 14. In each of those paragraphs Plaintiffs allege that the Enron representatives "stated" various matters set forth in bold, italicized, bullet points. As alleged, it is impossible to ascertain exactly what was said, to which analysts and/or investors (none of whom are identified by name), and whether the statements occurred in the conference call or a "follow-up conversation." But even more problematic, and absolutely fatal to Plaintiffs' claims, in neither instance do Plaintiffs attribute any specific statement(s) to any specific speaker, including Mr. Whalley.[3] In the end, then, there are *no* allegations as to what statements *Mr. Whalley* made, *if any*.

Accordingly, in paragraphs 366 and 388 Plaintiffs do not plead any actionable misrepresentations or omissions as to Mr. Whalley. *See Schiller v. Physicians Resource Group*, Inc., 2002 WL 318441 (N.D. Tex. 2002):

> The PSLRA and Rule 9(b) require Plaintiffs to identify the particular individual who made the misstatement or omission. Plaintiffs cannot avoid the bar on group pleading by simply identifying the constituents of a group of defendants in rote and

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[3] This failure apparently is the product of a deliberate choice. Transcripts of the analysts conference calls are available at one or more Internet sites for most (and perhaps all) of the fifteen analyst conference calls Plaintiffs refer to in the *Newby* Complaint. Indeed, it appears that Plaintiffs availed themselves of those transcripts in pleading those fifteen paragraphs, but instead of quoting directly from the transcripts and attributing a statement to a specific speaker, they paraphrased selected statements, set them off in bold italicized type, and then attributed them to a group of speakers. Had they truly desired to, they could have attributed most of the alleged misstatements to a specific speaker. The "group" approach appears to be an effort to tar someone like Mr. Whalley against whom Plaintiffs would otherwise have nothing at all.

> conclusory fashion. Plaintiffs cannot satisfy Rule 9(b) by attributing statements or omissions to the corporation without any identification of the officer or director responsible for making the statement.

Id. at *6. And there are no other allegations in the entire Complaint concerning statements by Mr. Whalley.

C. Vinson & Elkins Interview

In paragraph 855, Plaintiffs quote extensively from the letter of Vinson & Elkins to Enron that reported on V&E's investigation of Sherron Watkins's charges of improprieties. Among the points included from the V&E letter is that the authors had interviewed eleven people, among them Mr. Whalley. However, there is no other mention of Mr. Whalley in the letter, much less any statement attributed to him or any finding reportedly based on V&E's interview of him. The only statement from the V&E letter that can even remotely be associated with Mr. Whalley is the following: "In summary, none of the individuals interviewed could identify any transaction between Enron and LJM that was not reasonable from Enron's standpoint or that was contrary to Enron's best interests." As to Mr. Whalley, this is, at best, a prohibited group pleading. Even if it could be attributed to Mr. Whalley, it would fail as a fraud allegation under the PSLRA because it does not allege what he said, when he said it, how it was false, how he could have known it was false, or how it was material. Further, there is no indication that Mr. Whalley had any control over the V&E report.

D. Plaintiffs Do Not Allege Actionable "Insider Trading" by Whalley.

In Paragraphs 83(u), 84 and 401, Plaintiffs attempt to assert an insider trading claim against Mr. Whalley. They do so with no demonstrable evidence of any sales of stock by him. Plaintiffs'

effort to drag Mr. Whalley into this insider trading imbroglio is wholly without factual support, and the insider trading claims against him should be dismissed.

Plaintiffs have altogether failed to plead anything at all, and thus certainly nothing "unusual" or "suspicious" about Mr. Whalley's stock sales, or otherwise meet the requirements of Rule 9(b) and the PSLRA for pleading illegal insider trading, as reviewed in Section II.C.1 of the Joint Brief of Officer Defendants. None of the insider trading paragraphs identifies any specific material, publicly undisclosed information known to Mr. Whalley when he made the unknown stock sales about which Plaintiffs complain. Plaintiffs only generally allege that Mr. Whalley was in possession of some unspecified "adverse undisclosed information." (Complaint ¶ 83(u).) They do not plead that Mr. Whalley was aware of any specific non-disclosure; nor do they allege that Mr. Whalley was aware of any public misstatement. It is well settled that simply being a member of management — *i.e.*, in a position to know inside information — does not equate to scienter or knowledge of false statements. *Nathenson v. Zonagen*, 267 F.3d 400, 412 (5th Cir. 2001) (allegations of motive and opportunity alone are almost always insufficient to establish scienter). This is the kind of generalized, non-specific allegations the PSLRA outlawed. Paragraph 83(u) is further flawed by the absence of any allegation that the undisclosed information (itself unidentified) was material. The Complaint is devoid of (1) any specific allegations concerning nonpublic information (2) of which Mr. Whalley was aware or (3) how he knew the undisclosed information was material or nonpublic. *See In re Securities Litigation BMC Software,* 183 F. Supp. 2d at 916. Plaintiffs' allegations of insider trading are insufficient to state a claim and must be dismissed.

Plaintiffs also make no specific allegations regarding how Mr. Whalley's sales are improper, unusual, or suspicious – unsurprising since they fail to allege any facts at all about such sales. The

closest Plaintiffs come is to allege that "[t]hese defendants' illegal insider selling escalated massively as Enron's stock moved to more inflated levels during the Class Period and also when internally they knew the scheme was unraveling." This is yet another instance of group pleading, prohibited by the PSLRA, and is clearly completely inapplicable to Mr. Whalley's unidentified stock sales.

Beyond that defect, Plaintiffs' asserted insider trading claim against Mr. Whalley fails — and must be dismissed — for the following reasons. First, Plaintiffs do not — and cannot — allege a "pattern" of trading by Mr. Whalley. They allege no facts about any trading in the Class Period at all. Further, and unsurprisingly in light of the pleading deficiencies here, Plaintiffs point to no sales history outside the Class Period against which any relevant sales by Mr. Whalley could be measured. *See In re Securities Litigation BMC Software, Inc.*, 183 F. Supp. 2d at 901-02 (citing, *In re Silicon Graphics, Inc. Sec. Litig.*, 183 F.3d 970, 987 (9th Cir.), *reh'g and reh'g en banc denied*, 195 F.3d 521 (9th Cir. 1999), for proposition that "stock sales cannot be viewed as 'unusual' where defendant 'ha[s] no significant trading history for purposes of comparison.'")

Second, if Plaintiffs could even colorably allege that Mr. Whalley's trades had a "pattern," any such "pattern" would be inconsistent with Plaintiffs' allegations concerning the trading "pattern" of other Defendants who, according to the Complaint, were also "aware" of some undisclosed information. Indeed, according to the Complaint, one or more (but not all) of the Defendants collectively sold in almost every month of the Class Period. Plaintiffs then claim that each Defendant's sales "pattern" – although different from the others – somehow supports the same statistically certain inference. If, however, there truly is a specific "pattern" that demonstrates the use of inside information and other Defendants' sales match or establish that pattern, then Mr. Whalley's unspecified sales cannot possibly match that purported pattern. For example, it is patent

nonsense for Plaintiffs to allege that any conceivable "pattern"of Mr. Whalley could match the "pattern" of Mr. Lay's trades (which number in the hundreds), and that both are recognized patterns of trading on inside information. Any trading "matches" this "pattern." Indeed, according to Plaintiffs, every sale by every insider in the three-year Class Period was suspect. Like all "one size fits all" garments, Plaintiffs' droops here and pinches there.

Third, the timing of Mr. Whalley's sales obviously cannot be either suspicious or unusual, because they are wholly unspecified in the Complaint. His sales of stock, if any, presumably at various dates after options vested, are undoubtedly the type of activity that one would expect from a rational investor seeking to diversify his portfolio.[4] To establish "suspicious timing," Plaintiffs must show something about his sales, and particularly that his trades were "at times calculated to maximize personal benefit" to him. *In re Apple Computer Litigation*, 886 F.2d 1109, 1117 (9th Cir. 1989). A recognized example would be the sale of a significant percentage of his shares "immediately before a negative earnings announcement." *See, e.g., Wenger v. Lumisys*, 2 F. Supp. 2d 1231, 1251 (N.D. Cal. 1998). Conversely, sales made before the market peak, after its fall, or at other times not maximizing seller's proceeds, give rise to no inference of scienter. *See Nathenson,* 267 F.3d at 420-21 (sales made when stock well below "class period high" were "so inauspiciously timed" they "d[id] not meet this test."); *Greebel v. FTP Software*, 194 F.3d 185, 206 (1st Cir. 1999) ("timing does not appear very suspicious" where stock not "sold at the high points of the stock price."). "When insiders miss the boat [by selling well off the market peak], their sales do not

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[4]Under Plaintiffs' model, however, an Officer Defendant who sold everything as it vested (a not irrational diversification strategy), or simply sold enough to cover taxes on the exercise of options, would automatically be assumed to have traded on illegal inside information, *even if he had no inside information.*

support an inference" of scienter. *Ronconi v. Larkin*, 253 F.3d 423, 435 (9th Cir. 2001). The absence of specific facts about Mr. Whalley's sales gives rise to no inference at all.

In sum, Plaintiffs have not pleaded adequate specific facts to support a claim for insider trading against Mr. Whalley.

III. PLAINTIFFS' SECTION 20(a) AND 20A CLAIMS AGAINST MR. WHALLEY SHOULD BE DISMISSED.

For the reasons set forth in section III of the Joint Brief of Officer Defendants, Plaintiffs have failed to plead an actionable claim against Mr. Whalley under either sections 20(a) or 20A of the Exchange Act.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing document was forwarded to all counsel listed on the attached Exhibit A Service List by e-mail or facsimile on this 8th day of May, 2002.

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MARK NEWBY, et al., Individually and On Behalf of All Others Similarly Situated,	§	
	§	
Plaintiffs	§	
	§	
vs.	§	CIVIL ACTION NO. H-01-3624
	§	(Consolidated)
ENRON CORP., et al.,	§	
	§	
Defendants	§	
	§	

ORDER

Having considered the motion to dismiss filed by Defendant Lawrence Greg Whalley and all materials filed in support of and in opposition to this motion, and finding that the Complaint fails to state a claim against this Defendant upon which relief can be granted,

It is hereby ORDERED that:

1. Defendant's motion is GRANTED, and

2. The claims against Defendant Lawrence Greg Whalley are DISMISSED with prejudice.

SIGNED this _____ day of _____, 2002.

_____
Melinda Harmon
United States District Judge